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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-467

JOHN A. WIETHE

Appellant,

vs.

C. DONALD CURRY, REGISTRAR,

Respondent.

On Appeal From The Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

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Now comes the said Appellee, C. Donald Curry, Registrar for the Bureau of Motor Vehicles of the State of Ohio by and through his attorneys Simon L. Leis, Jr., Prosecuting Attorney of Hamilton County, Ohio, and Leonard Kirschner and Robert R. Hastings, Jr., Assistant Prosecuting Attorneys of Hamilton County, Ohio, and respectfully move this Court for an Order Dismissing the Appeal for the reason that there has been no denial of appellant's constitutional rights in the proceedings below as reflected in the record of trial proceedings and the opinions and rulings of the Court of Appeals and the Supreme Court of Ohio.

OPINIONS BELOW

The brief of the Appellant correctly cites the opinion and judgments below. The opinion the Court of Appeals of the First Appellate District is unreported but is reproduced and attached as Appendix A.

JURISDICTIONAL STATEMENT

This is an appeal by appellant from the Order of the Supreme Court of Ohio entered on June 27, 1975, which dismissed their appeal for the reason that no substantial constitutional questions were presented nor matters of great public importance presented.

STATUTES INVOLVED

The statute involved in this case is Ohio Revised Code 4511.19.1 which is set forth in its entirety at Appendix B of this Brief.

QUESTIONS PRESENTED

The appellants have raised four questions in this appeal which are:

(1) Whether O.R.C. Section 4511.19.1 which permits the Registrar of the Ohio Bureau of Motor Vehicles to suspend the drivers license of an individual prior to his being given notice and an opportunity for a hearing violates the due process of the Fourteenth Amendment?

(2) Whether O.R.C. Section 4511.19.1 violates the Fourth and Fifth Amendments as applied to the States by the Fourteenth Amendment by not requiring as a pre-condition for its applicabil-

ity the lawful arrest of the person whose licenses sought to be suspended?

(3) Whether O.R.C. Section 4511.19.1 which excludes essential elements of due process from the hearing on appeal of the suspension of a person's drivers license violates the due process clause of the Fourteenth Amendment?

(4) Whether assuming the suspension mandated by O.R.C. Section 4511.19.1 is not effective prior to notice and an opportunity for a hearing, the action of the Registrar suspending the license of Appellant prior to notice and an opportunity for a hearing violates the due process clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

The statement of facts of this case reflect that the Plaintiff-Appellant was operating his motor vehicle in the north bound direction on the expressway (R 10) at approximately 12:15 A.M. at a rate of speed of 84 m.p.h. in a 65 mile an hour zone (R 89, 90). The officer proceeded to stop the vehicle which pulled over to the Hopple Street exit of the expressway (R 90), at which time the officer arrested Plaintiff-Appellant by taking him into custody on the charge of speeding and driving while under the influence of alcoholic beverages (R 91). The officer testified with regard to the condition of the Plaintiff-Appellant that he walked with a sway (R 92), that he had occasion to smell his breath and that there was a moderate to strong odor of alcohol on his breath (R 92), and that the Plaintiff-Appellant admitted having two high balls between a period of 11:00 P.M. and 12:15 A.M.

(R 92), and that the Plaintiff-Appellant's mannerisms appeared slow and his face was red and he was extremely nervous (R 94), and that his eyes were bloodshot and watery (R 92). The officer then testified that based upon his observations of the Plaintiff-Appellant and the manner in which he was driving and the above observations; in light of his experiences, the Plaintiff-Appellant was operating his motor vehicle while under the influence of alcohol. The officer also said that he took the Plaintiff-Appellant into custody for the charges of driving while under the influence of an alcoholic beverage (R 91), which statement was further corroborated by Officer Mills on page 128 of the record wherein Officer Mills stated:

"Where he was under arrest by Officer Lierman"

Plaintiff-Appellant on page 25 amongst several other places in the record admitted that he was under arrest when he stated:

"I did not think he had reasonable grounds to arrest me."

The testimony further reflected that the Plaintiff-Appellant called his attorney; who was at the Police Station within thirty minutes of the time the call was made. Testimony was further shown that the plaintiff-appellant refused to take the breathalizer test unless certain conditions were met, namely, that he had a superior officer present and a doctor of his own choosing present to take a blood test (R 67). The record further reflected that he could not reach either of his own doctors to have them present. The record of the proceedings has several other basic statements reflecting that the plaintiff-appellant refused to take the test unless certain other personal conditions were met as reflected in other portions of his testimony

and in the testimony of Officer Lierman and Sergeant Mills. Upon the plaintiff-appellant's refusal to take the test he was read and shown the form prescribed by statute and warned of the consequences of his refusal.

It is to be further pointed out that the form which is part of the dockets, records and journal entries in this matter specifically says:

> "You are now under arrest for driving a motor vehicle while under the influence of alcohol . . ."

Private counsel of the said Plaintiff was with and conferred with the Plaintiff-Appellant during the entire period of the proceedings as reflected by the testimony from approximately 1:30 A.M. in the morning.

In accordance with the law in the State of Ohio the Appellee-Registrar of the Bureau of Motor Vehicles sent the appellant a notice that his license would be suspended for a period of six months for failure to comply with Ohio Revised Code 4511.19.1 unless he filed an appeal in the Municipal Court within twenty (20) days within the date of the mailing of said letter. In accordance with the notification by the Registrar of the Bureau of Motor Vehicles the appellant in these proceedings filed his appeal to the Hamilton County Municipal Court and all suspension proceedings were stayed as against him.

After a hearing at which evidence was presented the Hamilton County Municipal Court Judge determined that Ohio Revised Code 4511.19.1 was constitutional and that the Appellant in these proceedings had refused to take the test as provided by law and thereupon suspended the appellant's driving rights in the State of Ohio for a period of six (6) months. The Appellant in these proceedings filed a timely Notice of Appeal to the Court of Appeals of the First Appellate District which auto-

matically stayed any suspension of his driving rights in accordance with the provisions of Ohio Revised Code 4511.19.1.

In the appeal to the Court of Appeals of the First Appellate District of Hamilton County, Ohio, the appellant cited six Assignments of Error which were:

I. OHIO REVISED CODE SECTION 4511.19.1 IS UNCONSTITUTIONAL.

II. SECTION 4511.19.1, IF CONSTITUTIONAL, WAS APPLIED IN AN UNCONTITUTIONAL MANNER.

III. THE TRIAL COURT ERRED BY NOT PERMITTING APPELLANT TO AMEND HIS PETITION TO CONFORM TO THE EVIDENCE.

IV. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO STRIKE PARAGRAPH 3-d FROM APPELLANT'S PETITION.

V. THE TRIAL COURT'S JUDGMENT IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

VI. THE SUSPENSION OF APPELLANT'S LICENSE FOR REFUSAL TO TAKE THE BREATHALYZER TEST WHEN HE OFFERED TO TAKE OTHER CHEMICAL TESTS VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court of Appeals of the First Appellate District after hearing arguments of counsel rendered their decision on or about March 24th, 1975, (See Appendix A) in which they affirmed the suspension of the Plaintiff-Appellant's driving rights.

The Plaintiff-Appellant filed a timely Notice of Appeal to the Supreme Court of Ohio which in effect stayed any suspension of his driving rights pending that appeal. The Supreme Court of Ohio denied jurisdiction on or about June 27th, 1975. Defendant-Appellant then endeavored to go to the United States District Court for the Southern District of Ohio by way of declaratory judgment proceedings, etc. This proceeding was subsequently dismissed without a hearing on the merits by the Plaintiff-Appellant and a Notice of Appeal was filed to this Court.

ARGUMENT

I.

OHIO REVISED CODE SECTION 4511.19.1 SHOULD BE FOUND TO BE UNCONSTITUTIONAL BECAUSE IT PROVIDES FOR A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

At the outset let it be understood that we heartily concur with the general proposition that there cannot be a deprivation of a substantial right without due process of law. We believe that the statute of the State of Ohio on its face and as interpreted by the Ohio Courts clearly fall within the guidelines of this Court as pronounced in the case of *Bell* v. *Burson* as reported in 402 U.S. 535.

It is respectfully submitted that in every case cited by the Plaintiff-Appellant in these proceedings where the statute has been determined to be unconstitutional there has been determined to have been an immediate suspension of a driving right without any opportunity of hearing or contesting the matters involved until sometime substantially in the future. Pending that determination at some substantial date in the future the driving right had been suspended. In light of the pronouncement of this Court as reflected in *Bell* v. *Burson,* ibid., we respectfully submit that the cases cited by the Plaintiff-Appellant in these proceedings were properly decided. However, what Plaintiff-Appellant has not reflected is the fact that in Ohio the suspension of the driving rights does not begin to run until such time as the person whose license is being sought has had his opportunity of his hearing and any appellate proceedings thereon. In the State of Ohio under the current statute as it currently exists the driver does not even have to post any type of bond after his initial hearing while the matter is pending further appellate review. The Court of Appeals for Cuyahoga County which is the highest Court of direct appeal as of right in matters emanating from the Municipal Court in the case of *Fell* v. *Bureau* as reported in 30 O.A. 2d 151 at page 158 specifically held:

> "The Supreme Court of the United States has held that procedural due process of the Fourteenth Amendment requires that notice and opportunity for a hearing must be given before a driver's license can be suspended. *Bell* v. *Burson* (1971), 402 U.S. 535; *Jennings* v. *Mahoney* (1971), 404 U.S. 25. R. C. 4511.19.1 (E) complies with this requirement and therefore the due process argument raised by the plaintiff is not well taken."

We respectfully submit that the following is a quote from Ohio Revised Code, Section 4511.19.1 Section E:

> ". . . the suspension shall begin at the termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person." (person refers to the driver whose license is being sought to be suspended.)

In another case; the Hamilton County Municipal Court rendered a well-reasoned decision interpreting the Ohio statute as reflected by *Bell* v. *Burson,* ibid., to be constitutional. We have attached a copy of that opinion as our Appendix C.

The Court specifically held in the case of *Bell* v. *Curry* as reported in 68 O.O. 2d 109 at 111:

> "It is the belief of this Court that Ohio's statutory provision affording the opportunity of a hearing to the aggrieved party without the loss of any rights pending the hearing and full determination of the issues raised clearly does not violate any due process requirements of the United States Constitution or the Constitution of the State of Ohio."

We therefore respectfully believe that Ohio Revised Code 4511.19.1 is constitutional on its face and is constitutional as interpreted by the Courts of Ohio which interpretations were prior to the case currently before this Court.

II.

OHIO REVISED CODE SECTION 4511.19.1 IS UNCONSTITUTIONAL SINCE IT DOES NOT REQUIRE A PERSON TO HAVE BEEN LAWFULLY ARRESTED PRIOR TO HIS BEING ASKED TO SUBMIT TO THE CHEMICAL TEST.

We respectfully submit that this allegation of alleged error is improper on two basic grounds. It is always and has always been a fundamental principle both in the State of Ohio and in the Supreme Court of the United States that you cannot raise in the Supreme Court matters which were not raised at the first opportunity, namely, in the trial Court or on the first right of appeal.

The Supreme Court of Ohio in the case of *State ex rel. King* v. *Shannon* as reported in 170 O.S. 393 at page 394 held:

> "It is an established rule of long-standing in this state that a constitutional question either in a civil or a criminal action, cannot be raised in the Supreme Court unless it was presented and urged in the Court's below."

This general principle of law has been codified with regard to the jurisdiction of this Court under Title 28 U.S.C., Section 1257.

Under the procedures and pronouncements of the Supreme Court of the State of Ohio the alleged allegations of error as set forth in alleged errors before this Court were never raised or presented either in the trial court or in the Court of Appeals of the First Appellate District being the Court of direct appellate review. We have specifically set forth in our Statement of the Facts the Assignments of Error which were raised on direct ap-

peal which indicates this matter was never relied on in the lower court. A reading of the briefs of counsel both in the Hamilton County Municipal Court and in the Court of Appeals of the First Appellate District would substantiate the fact that this issue was never raised in that Court.

However, even if this were a valid issue to be determined by this Court; which we feel it is not in light of the failure to have raised this matter at the first opportunity, we respectfully submit that the law as interpreted by the Ohio Courts still clearly reflect that the statute is constitutional. The record of the proceedings of the initial trial in this matter clearly reflect that over 50 pages of testimony was given relative to the validity of the arrest. In the course of the proceedings the plaintiff-appellant admits that he had been arrested and that he had been tried in other proceedings on the driving while under the influence charge. The basic issue is the validity of the arrest and not the determination as to whether or not the defendant is guilty or innocent of the charges for which he has been arrested. As indicated the Court took over 50 pages of testimony relative to the validity of the arrest itself. Therefore, even if the pronouncements in the case of *Holland* v. *Parker* as reported in 354 F. Supp. 196 were valid and binding; which they are not upon this Court, we respectfully submit that the Ohio Statute and the procedures undertaken in this case clearly fell within the gundelines set forth in this case.

Accordingly for the reason that the alleged error number II was not raised at the trial court level or on direct appeal and for the further reason that the Ohio Court in this case in its interpretation of the Ohio law went to the validity of the arrest; we respectfully submit that this alleged error is without merit.

III.

THE EXCLUSION OF ESSENTIAL ELEMENTS FROM THE HEARING DOES NOT MEET THE CONSTITUTIONAL STANDARDS ESTABLISHED BY THIS COURT.

Once again we respectfully submit that matters which were not raised at the trial court level nor on direct appeal cannot be raised either in the Supreme Court of Ohio as reflected in the *State ex rel. King* v. *Shannon,* ibid, or in the United States Supreme Court as reflected in the United States Code Section 1257, ibid. We respectfully direct this Court's attention to the assignments of error raised in the Court of Appeals of the First Appellate District which would clearly reflect that this specific issue was never raised in the Court of Appeals of the First Appellate District as a violation of any constitutional rights, etc. The closest thing to the raising of this issue was the Assignment of Error No. IV as raised in the Court of Appeals being:

> "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO STRIKE A PORTION OF PARAGRAPH 3 IN THE ORIGINAL PETITION."

At no time did the Plaintiff-Appellant ever indicate in his Assignment of Error to the Court of Appeals for the First Appellate District that there was a violation of his constitutional rights or that the statute in question was unconstitutional by virtue of its limiting the issues to be heard at said hearing. However, once again we respectfully submit that even if this issue was raised which it wasn't, the record of the proceedings will clearly show that the allegation of alleged error are without merit.

The testimony in this case clearly reflected that the Plaintiff-Appellant in these proceedings was well-versed in the law and that within less than 30 minutes from the time he was brought to the police station he had an attorney present at his side at all times.

The Court of Appeals after going through the voluminous record of the proceedings reflected in their opinion:

> "The contention raised herein is that the Appellant was denied his statutory rights to confer privately with counsel and to rely on the good faith advice of counsel not to take the 'breathalizer' test.
>
> Whatever merit this argument might otherwise have, an examination of the record has failed to disclose any testimony on appellant's part, or other evidence, to the effect that his refusal to take the test was predicated upon the advice of counsel. On the contrary, appellant testified numerous times that his decision was predicated upon his own conclusions that the test would not be fairly administered because of acts and statements of the officers indicating a 'prejudiced' attitude toward him. Appellant's failure to adduce any evidence from which it could properly be concluded that his reason for failing or refusing to take the test was founded on advice of counsel, necessarily removes this issue from our consideration. Moreover, while the evidence was adduced tending to show that appellant and his counsel were not provided with a private room in which to confer, they were allowed to use a table in a corner of a room out of ear shot of officers Lierman and Mills. Even if we were to hold that the right to confer with counsel attended these proceedings, we would not view an accused right to privately confer with counsel to require that he be provided with a private room."

We therefore respectfully request that the alleged error number three is without merit for the reason that it

was not raised at the initial trial level nor on direct appeal and therefore it is not appropriate for this Court to undertake said matter on direct appeal or on certiorari. We further respectfully submit that even if it was properly raised that the record of the proceedings and the rulings of the Court below clearly refute the allegations of the Plaintiff-Appellant in this matter.

IV.

STATUTES WHICH MAY BE OTHERWISE CONSTITUTIONAL MAY BE APPLIED IN AN UNCONSTITUTIONAL MANNER.

We would heartily agree with this general statement of the law. However, we respectfully disagree with the allegations of alleged facts as set forth in the brief which are not born out by the record of the proceedings and pleadings in this matter. The record clearly reflects that a letter was sent to the Plaintiff-Appellant on October 29th, 1973, advising him of proposed suspension. The letter further advised him that he had twenty (20) days from the mailing of the notice to file a Petition in the Municipal Court. The letter, which is part of the evidence in this case, specifically stated:

> "If the described petition is filed, the effective date of *the suspension indicated above is automatically cancelled and the suspension will begin upon termination of any hearing and/or appeal* which results in a decision unfavorable to you. . . ." (Italics ours for emphasis.)

Clearly, the Plaintiff-Appellant in these proceedings was advised that the suspension was not immediately effective and that he had his opportunity to go to the Courts for a hearing if he so desired. This pronouncement by the Defendant in these proceedings clearly falls in line with

the interpretation of the Ohio Statute by the Courts in the case of *Fell* v. *Bureau,* ibid., and *Bell* v. *Curry,* ibid., in which the Courts have held that the suspension does not begin to run until after the hearing or any appeal therefrom.

CONCLUSION

In conclusion, it is respectfully submitted that Ohio Revised Code 4511.19.1 is constitutional as written and as interpreted by the Courts of Ohio. We therefore respectfully submit that the Motion to Dismiss the Appeal should be granted and that this Court should not in the alternative consider this matter as a Petition for Writ of Certiorari in light of the fact that the Plaintiff-Appellant has considered his brief to be basically a direct appellate proceeding. We respectfully submit in the current posture of the case based upon the record of the proceeding in the lower Court and on direct appeal and in light of the statute itself and its interpretation by the State Court this Court should grant the Motion to Dismiss.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-74475

JOHN A. WIETHE,
Plaintiff-Appellant,

vs.

C. DONALD CURRY, REGISTRAR,
Defendant-Appellee.

DECISION

Filed March 24, 1975

Mr. Marvin Kolstein, 607 Terrace Hilton Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant.

Messrs. Simon L. Leis, Jr., Leonard Kirschner and Robert R. Hastings, Jr., 420 Hamilton County Courthouse, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, transcript of the docket and journal entries and original papers from the Hamilton County Municipal Court, transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

At approximately 12:15 A.M. on the morning of October 9, 1973, John Wiethe, the appellant herein, was traveling northbound on Interstate 75 at a rate of speed in excess of the posted limit. Patrolman Robert Lierman of the Cincinnati Police Department observed the appellant and caused the appellant to stop his vehicle.

After asking the appellant for his driver's license, an accident occurred between the appellant's vehicle and the officer's police cruiser prompting the officer to call his supervisor, Sergeant Howard Mills, to the scene. Thereafter, based upon Officer Lierman's observations of the appellant's driving and his physical condition, the appellant was charged with speeding and driving under the influence of an alcoholic beverage.

The appellant was then transported in his own vehicle to a Cincinnati police station where he was permitted to summon his attorney. Once appellant's counsel arrived, the appellant expressed an unwillingness to undergo a "Breathalizer" test unless it was supervised by a police officer of a rank higher than that of Sergeant Mills', and unless a physician was present to take a contemporaneous blood test.

The appellant reiterated his reluctance to take the test, predicating his reluctance on his fear that the test would be improperly administered. Deeming appellant's requirements to constitute *a refusal to take* the "Breathalizer" test, the police read to the appellant the Ohio Implied Consent Law and the ramifications of his refusal to take the test. Subsequently, the police forwarded the appropriate notice of such refusal to the Ohio Department of Motor Vehicles.

Thereafter, following a trial on charges of violation of R. C. 4511.19 in which appellant was found to be not guilty, the appellant was notified that his driver's license

was suspended, such suspension to begin upon the receipt by the Bureau of Motor Vehicles of appellant's license. In accordance with the provisions of that notice, the appellant filed a timely notice of appeal in the Hamilton County Municipal Court.

The cause was heard on August 7, 1974. At the conclusion of all the evidence and following the submission of supplemental memorandum briefs, the court ruled 1) that Section 4511.191, Ohio Revised Code is constitutional, and 2) that the appellant had failed to show any error on the part of the Registrar of the Bureau of Motor Vehicles. Whereupon, the appellant filed a timely notice of appeal to this Court.

Six assignments of error are presented for our review which will be considered in the order of their listing. The first assignment contains the assertion that Section 4511.191, O.R.C. is unconstitutional.

We preface our remarks on this assignment with the note that this statute has been judically construed in Ohio and has repeatedly been found to be constitutional by the courts of this State, including its highest court. See, *State* v. *Starnes,* 21 Ohio St. 2d 38; *Bell* v. *Curry,* 68 Ohio Op. 2d 109. We are obviously not at liberty to re-examine this basic determination.

In particular support of his contention of the statute's unconstitutionality, the appellant argues that the statute provides for a deprivation of property prior to notice and a hearing, thereby denying the petitioner, the appellant herein, due process under the law.

This contention is without foundation. Section 4511.-191 (E) provides that: "If a person whose license, permit to drive, or non-resident operating privilege has been suspended, petitions for a hearing or appeals any decision which is adverse to him, *the suspension shall begin at the*

termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person." (emphasis added) Therefore, if the person institutes any type of appellate procedure regarding the suspension, the suspension *can not* take effect until the appellate procedures have been exhausted.

In *Fell* v. *Bureau of Motor Vehicles,* 30 Ohio App. 2d 151, the Court of Appeals for Cuyahoga County held that:

> "This is only a conditional or proposed suspension because if the licensee files a petition and requests a hearing, the suspension shall not begin until the hearing on the petition, or any appeal therefrom, is terminated unfavorably for the licensee. . . . Hence, under R. C. Section 4511.191 there will be a hearing and determination before the license is actually suspended unless no petition for hearing is filed."

By virtue of the Ohio Supreme Court's having dismissed an appeal taken from the above cited decision, we must assume that tacit approval has been accorded to it.

Accordingly, we hold that Section 4511.191, O.R.C. is constitutional, and appellant's first assignment of error is without merit.

In assignment number two, appellant contends that: Section 4511.191, if constitutional, was applied in an unconstitutional manner." The appellant maintains that through the letter sent to him by the Registrar, the appellant's driver's license was already under suspension, and had been effectively under suspension, since October 29, 1973.

For the reasons given in our consideration of appellant's first assignment of error, we conclude that appellant's license is not now under suspension, nor can it be under suspension until such time as all of the appellant's

appellate procedures have been exhausted. The second assignment of error is without merit.

Appellant argues in his third assignment of error that: "The Trial Court erred by not permitting appellant to amend his petition to conform to the evidence." The appellant incorporates into this argument the question of whether the "arresting officer" had in fact placed the appellant under arrest on the morning of October 9, 1973.

In spite of the fact that the petition was not amended to reflect the evidence adduced at the hearing, an examination of that evidence has convinced us that Officer Lierman had taken the appellant sufficiently under his control to have put the appellant on notice that he was under arrest. The testimony of Officer Lierman was that:

> "Q. Was Mr. Wiethe placed under arrest?
> A. Physically, did I say, 'I arrest you'? No.
> Q. Did you take him into custody?
> A. Yes, I had him in my control.
> Q. What charges was he taken under your control for?
> A. Speeding and driving under the influence of an alcoholic beverage."

While we agree with the holding of *Toledo* v. *Lowenberg*, 99 Ohio App. 165, that every stopping or detention of a person does not constitute an arrest, it is manifest from the facts before us that Officer Lierman had the requisite intent to arrest the appellant for speeding, and upon further investigation, to add the additional charge of driving while intoxicated. The officer's stopping of the appellant was clearly an arrest.

Therefore, the error of the Trial Court in failing to permit the amendment of the petition to conform to the

evidence was harmless. The third assignment of error is not well taken.

The appellant contends in his fourth assignment of error that: "The Trial Court erred in granting appellee's motion to strike paragraph (3 d) from appellant's petition." This paragraph reads: "That if the Plaintiff did refuse to submit to the test, it was upon the advice of his attorney, and that if Plaintiff follows the advice of his attorney he, therefore, does not come under the operation of Section 4511.191 of the Ohio Revised Code."

The contention raised herein is that the appellant was denied his statutory right to confer privately with counsel and to rely on the good faith of counsel not to take the "Breathalizer" test.

Whatever merit this argument might otherwise have, an examination of the record has failed to disclose any testimony on appellant's part, or other evidence, to the effect that his refusal to take the test was predicated upon the advice of counsel. On the contrary, appellant testified numerous times that his decision was predicated upon his own conclusion that the test would not be fairly administered because of acts and statements of the officers indicating a "prejudiced" attitude toward him. Appellant's failure to adduce any evidence from which it could properly be concluded that his reason for failing or refusing to take the test was founded on advice of counsel, necessarily removes this issue from our consideration. Moreover, while evidence was adduced tending to show that appellant and his counsel were not provided with a private room in which to confer, they were allowed to use a table in a corner of a room out of the earshot of Officers Lierman and Mills. Even if we were to hold that the right to confer with counsel attended these proceed-

ings, we would not view an accused's right to privately confer with counsel to require that he be provided with a private room.

Accordingly, appellant's fourth assignment is overruled.

Finally, in his fifth and sixth assignments of error, appellant argues that the judgment was contrary to the manifest weight of the evidence, and that appellant was not accorded that due process of law guaranteed him by the United States Constitution where he was precluded from designating an alcohol test of his own choosing. We elect to consider these assignments together because of their overlapping character.

In the determination of the first of these issues, our review is necessarily circumscribed by the holding in *State* v. *Starnes,* supra, the second syllabus of which is as follows:

> "2. Section 4511.191 (F), Revised Code, does not violate the due process clause of the Fourteenth Amendment to the United States Constitution by permitting suspension of a person's driver's license upon proof less than proof beyond a reasonable doubt that (1) a police officer had reasonable ground to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol (2) the person was placed under arrest (3) the person refused to submit to a chemical test upon request of the officer and (4) the person was advised of the consequences of his refusal. Proceedings under Section 4511.191 (F), Revised Code, are civil and administrative in nature and are intended for the protection of the travelling public, and are independent of any criminal proceedings which may be instituted pursuant to other statutes or ordinances."

Thus, if the record reveals credible evidence of probative value on each of the four elements of proof set forth above, we take it that the judgment of the trial court may not be said to be contrary to the manifest weight of the evidence, nor was it contrary to law, nor generally may it be said to conflict with requirements of due process of law, even where, as here, the appellant was acquitted of the separate criminal offense of driving while intoxicated growing out of the same incident giving rise to the Section 4511.191, Revised Code proceedings.

With respect to much of appellant's argument, we are constrained to point out that this Court is not free to indulge its own reasoning or rationale unless we are able to honestly conclude that the issue is one to which superior authority has not addressed itself. Where the Supreme Court has directly spoken to an issue, as here, debate is precluded, at this level, at least.

Examining the record against the *Starnes* criteria, we conclude that there was credible evidence which, if believed by the trier of facts, would support a finding: (1) that Officer Lierman had reasonable grounds to believe that the appellant was operating an automobile on a public highway while under the influence of alcohol, and that this determination is not necessarily animadverted by a subsequent failure to secure a conviction by proof beyond a reasonable doubt in a separate but related criminal charge; (2) that the appellant was placed under arrest, although these actual words were not used, where his liberty was restrained and he was taken into custody by Officers Lierman and Mills; (3) that appellant's willingness to take psychomotor tests *in lieu* of the breath test authorized by statute and regulations, whether or not his apprehensions in connection therewith were well founded, constituted a refusal to submit to a chemical

test upon request of the officer; and (4) the appellant was advised of the consequences of his refusal to take the chemical test.

The foregoing determinations dictate our overruling of appellant's fifth and sixth assignments of error, and our affirmance of the judgment below.

The judgment is accordingly affirmed.

SHANNON, P. J., PALMER and STRAUSBAUGH, J. J.

STRAUSBAUGH, J., OF THE TENTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

OHIO REVISED CODE § 4511.191

4511.191 Chemical tests for determining alcoholic content of blood; effect of refusal to submit to test.

(A) Any person who operates a motor vehicle upon the public highways in this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways in this state while under the influence of alcohol. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

(B) Any person who is dead, unconscious, or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn consent provided by division (A) of this section and the test or tests may be administered, subject to sections 313.11 to 313.16, inclusive, of the Revised Code.

(C) Any person under arrest for the offense of driving a motor vehicle while under the influence of alcohol shall be advised at a police station of the consequences of his refusal to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section. The advice shall be in a written form prescribed by the registrar of motor vehicles and shall be read to such person. The form shall contain a statement that the

form was shown to the person under arrest and read to him in the presence of the arresting officer and one other police officer or civilian police employee. Such witnesses shall certify to this fact by signing the form.

(D) If a person under arrest for the offense of driving a motor vehicle while under the influence of alcohol refuses upon the request of a police officer to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section, after first having been advised of the consequences of his refusal as provided in division (C) of this section, no chemical test shall be given, but the registrar of motor vehicles, upon the receipt of a sworn report of the police officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol and that the person refused to submit to the test upon the request of the police officer and upon the receipt of the form as provided in division (C) of this section certifying that the arrested person was advised of the consequences of his refusal, shall suspend his license or permit to drive, or any nonresident operating privilege for a period of six months, subject to review as provided in this section; or if the person is a resident without a license or permit to operate a motor vehicle in this state, the registrar shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation.

(E) Upon suspending the license or permit to drive or nonresident operating privilege of any person, as provided in division (D) of this section, the registrar shall immediately notify the person in writing, at his last known address, and inform him that he may petition for a hearing as provided in division (F) of this section. If a per-

son whose license, permit to drive, or nonresident operating privilege has been suspended, petitions for a hearing or appeals any decision which is adverse to him, the suspension shall begin at the termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person.

(F) Any person whose license or permit to drive or nonresident operating privilege has been suspended under this section, may, within twenty days of the mailing of the notice provided above, file a petition in the municipal court or the county court, or in case such person is a minor in the juvenile court, in whose jurisdiction such person resides or in whose jurisdiction the arrest occurred if such person is not a resident of this state, agreeing to pay the cost of the proceedings and alleging error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in this section, or both. Such petitioner shall notify the registrar of the filing of the petition and send him a copy. The scope of such hearing shall be limited to the issues of whether a police officer had reasonable ground to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol, whether the person was placed under arrest, whether he refused to submit to the test upon request of the officer, and whether he was advised of the consequences of his refusal.

(G) The registrar shall furnish the court a copy of the registrar's affidavit as provided in division (C) of this section.

In hearing the matter and determining whether such person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section, the

court shall decide such issue upon the registrar's certified affidavit and such additional relevant, competent, and material evidence as either the registrar or the person whose license is sought to be suspended submits.

In such proceedings the registrar shall be represented by the prosecuting attorney of the county where such person resides.

If the court finds from the evidence submitted that such person has failed to show error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, then the court shall assess the cost of such proceeding against such person and shall impose the suspension provided in division (D) of this section. If the court finds that such person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, the cost of the proceedings shall be paid out of the county treasury of the county in which the proceedings were held, and the suspension provided in division (D) of this section shall not be imposed. The court shall give information in writing of the action taken to the registrar of motor vehicles.

(H) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, the registrar shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

(1971 H 792, eff. 2-3-72. 1969 H 1; 132 v S 512, H 380)

APPENDIX C

OPINION OF HAMILTON COUNTY MUNICIPAL COURT

JAMES R. BELL

Plaintiff,

v.

C. DONALD CURRY,
Bureau of Motor Vehicles,

Defendant.

HAMILTON COUNTY MUNICIPAL COURT.

(No. 163586—Decided February 25, 1974.)

Jerome L. Schimpf, of Cincinnati, for Plaintiff.

Simon L. Leis, Jr., prosecuting attorney, *Leonard Kirschner* and *Robert Hastings,* assistant prosecuting attorneys, all of Cincinnati, for Defendant.

SCHOTT, J. This matter having come before the court on the Amended Complaint filed by the plaintiff and upon the Answer thereto, and upon the evidence and the exhibits which were introduced into evidence, this court does hereby find that there were two issues submitted to this court, namely, did the arresting officer have reasonable grounds to believe that the plaintiff had been operating his motor vehicle upon the public highways of this State while under the influence of alcohol; and, whether R.C. § 4511.19.1 is constitutional in light of recent rulings by the United States Supreme Court.

As to the first issue, it is quite clear that from the evidence presented that the officer who made the arrest had more than a reasonable ground to believe that the plaintiff was operating his motor vehicle upon the public highways of this State while under the influence of alcohol. The testimony of the plaintiff, himself, admitted the fact that he had been drinking, that he was operating his motor vehicle in the wrong direction on a one-way street, and that he struck another automobile while so operating his motor vehicle.

The next question presented in the course of the proceedings was taken under submission by this court in order to research the legal points raised during argument as to the constitutionality of R.C. § 4511.19.1 in light of recent United States Supreme Court rulings in this general area.

There was cited for consideration of this court and the basic authority, the case of *Bell* v. *Burson* as reported in 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586. It is the opinion of this court that the factual situation as presented in the *Bell* v. *Burson* case is clearly distinguishable from the factual situation as presented in this case insofar as statutory requirements are concerned under R.C. § 4511.-19.1. In fact, as will be hereinafter set forth, it is the belief of this court that a careful reading of the United States Supreme Court decision in the *Bell* v. *Burson* matter clearly indicates that the procedures set up by the Ohio Legislature in setting up the Ohio Implied Consent Law, as this Section is commonly referred to, clearly affords due process to any person or persons who are to be deprived of their driving rights. This was completely contrary to any procedures afforded by the Georgia statute in the case of *Bell* v. *Burson*.

As Mr. Justice Brennan who delivered the Opinion of the Court in the *Bell* v. *Burson* case stated on page 94 of the Law Edition Opinion:

"Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. . . .This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'."

This court agrees with this general proposition of law as set forth by the United States Supreme Court.

Therefore, the issue before this court is whether or not Ohio's Implied Consent Law affords a due process hearing for the purposes of suspension of a license? A little earlier than one year prior to the *Bell* v. *Burson* case, the Ohio Supreme Court in the case of *State* v. *Starnes,* 21 OhioSt.2d 38, 50 O.O.2d 84, specifically declared Ohio's Implied Consent Law constitutional and stated that in their opinion the statute did not violate the due process requirements of the United States Constitution or the Constitution of the State of Ohio. However, as indicated above, the Ohio Supreme Court case was determined a little over one year prior to the *Bell* v. *Burson* case and this court has found no specific reference by the Ohio Supreme Court insofar as Ohio's Implied Consent Law is concerned and the issues raised by *Bell* v. *Burson.* Therefore, this court will proceed to compare Ohio's Implied Consent Law as against the statute which was before the United States Supreme Court in the *Bell* v. *Burson* case.

The Georgia statute which was under attack in *Bell* v. *Burson* provided that the license of an uninsured motorist involved in an accident shall be suspended unless he posts security to cover the amount of the damages claimed by the aggrieved parties. The Georgia law specifically excluded consideration of the motorist's fault or liability for the accident saying that in their numerous decisions interpreting their law that the fault or innocence of the parties had nothing to do with the requirement to post the insurance in question. The Supreme Court of the United States held in *Bell* v. *Burson* that the State had the authority to bar the issuance of licenses to all motorists who did not carry liability insurance or who did not post security. However, the Supreme Court held that there had to be some opportunity afforded and reasonable relationship to the liability in order to suspend a license as to one particular segment of the population who did not have insurance and who were involved in accidents. The Supreme Court of the United States then goes on to compare the Georgia statute and show that the basic interpretation and reason for the Georgia statute was that it was to be used as a club or force to see to it that persons injured by uninsured motorists were paid. The Court states in their Opinion that the Georgia statute specifically authorizes the reissuance of a license or the keeping of a license by an uninsured motorist involved in an accident if the aggrieved party has been compensated or signs a release authorizing the release of this license. The Court goes behind the basic wording of the statute and says that this is a form of guaranteeing the payment to injured parties by uninsured motorists and in effect is a demtermination of responsibility statute. The Supreme Court of the United States has said that the fact that the determination of responsibility being an integral part of the whole pro-

ceeding; the failure of the allowance of a hearing anywhere in the proceedings on this issue denies the uninsured motor vehicle operator due process of law in the taking of his license.

R.C. § 4511.19.1 (F) specifically affords the person whose license is to be taken an opportunity to be heard. Counsel for the plaintiff in these proceedings agrees with the fact that Ohio does afford a hearing under R.C. § 4511.19.1 (F). However, counsel's argument is that Ohio does not afford the motorist whose license is to be suspended a hearing prior to the suspension of the driving rights.

A full and complete reading of the Section of the Code in question would require this court to disagree with the interpretation of counsel for the plaintiff in this proceeding. The Section specifically says that the aggrieved party has twenty days within which to file a pleading in the Court in the jurisdiction where he resides to afford him the opportunity of a hearing. The statute in question also specifically authorizes the motorist to operate his motor vehicle during the pendency of the hearing which he has requested and any appeals therefrom. It is the belief of this Court that the Ohio Implied Consent Law (R.C. § 4511.19.1) has to be read as an entirety and that there is no effective suspension until the passing of twenty days from the date of the mailing of a letter of notification to the motorist involved. It is the belief of this court that Ohio's statutory provision affording the opportunity of a hearing to the aggrieved party without the loss of any rights pending the hearing and full determination of the issues raised clearly does not violate any due process requirements of the United States Constitution or of the Constitution of the State of Ohio.

The Ohio Supreme Court has specifically ruled that this

proceeding is a civil administrative proceeding (*State* v. *Starnes,* 50 O.O.2d 84 at page 88).

It is therefore the opinion of this ocurt that the plaintiff's second argument that R.C. § 4511.19.1 is unconstitutional because it does not afford a hearing and therefore violates the due process requirements of the United States Constitution and the Constitution of the State of Ohio is without merit.

Accordingly, there being a failure in the showing of any error and the statute being determined to be constitutional this court does hereby uphold the order of suspension which has been held in abeyance pending the determination of this case and does hereby reinstate said suspension as against the plaintiff in these proceedings for a period of six months as provided by law.

Costs of these proceedings are taxed to the plaintiff.